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IN THE

# Supreme Court of the United States

IMPRESSION PRODUCTS, INC.,

*Petitioner,*

*v.*

LEXMARK INTERNATIONAL, INC.,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit*

## BRIEF OF ASSOCIATION OF SERVICE AND COMPUTER DEALERS INTERNATIONAL, INC. AND OWNERS' RIGHTS INITIATIVE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

In *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), the Court held that textbooks manufactured and first sold abroad, which bore legends to the effect of "Not for sale in the United States," could lawfully be imported and resold in the U.S. under the first sale doctrine. This case presents essentially the same issues under patent law:

1. Whether "conditional sale" of a patented item—a sale that transfers ownership while purportedly imposing restrictions, much like the "Not for sale in the United States" legends in *Kirtsaeng* —trumps patent exhaustion, which is patent law's first sale doctrine.

2. Whether the principles underlying the holding in *Kirtsaeng*—that the first sale doctrine is based on common law's abhorrence of restraints on alienation and "makes no geographical distinctions"—apply with equal force in the patent arena.

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## STATEMENT OF INTEREST

Because the questions presented have enormous practical implications, the organizations represented in this brief urge the Court to grant the petition. *Amicus curiae* Association of Service and Computer Dealers International, Inc. ("ASCDI") is a trade group of more than 300 small-to-medium technology companies. ASCDI members deal in technology products that practice U.S. patents and support technology users throughout America.

*Amicus curiae* Owners' Rights Initiative ("ORI") is a coalition that seeks to protect ownership rights in personal property. The steering committee consists of ASCDI; eBay Inc. ("eBay"), a global platform of online marketplaces, payment services, and retailing and marketing solutions; Redbox Automated Retail, LLC, a subsidiary of Outerwall Inc., which rents movies and games at approximately 35,000 automated kiosks nationwide; Radwell International, Inc., which sells and repairs industrial devices; United Network Equipment Dealers Association (UNEDA), an alliance of more than 250 used network equipment dealers; the American Library Association, which has more than 55,000 member libraries; and the Association of Research Libraries, whose more than 120 members include major university, national and public research libraries.

* The parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, *amici curiae* state that no counsel for a party has authored this brief, in whole or in part, and no person, other than *amici curiae* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

## THE CASE AT BAR IS PATENT LAW'S *KIRTSAENG*—AN ISSUE OF VITAL IMPORTANCE TO OWNERSHIP RIGHTS

Countless everyday items, ranging from clothing accessories to kitchen utensils, practice patents.[1] Technology products are often layered in patents—the average smartphone, for example, is covered by approximately 250,000 patents.[2] Thus, for anyone who owns or deals in personal property, it is vitally important to know where patent rights end and ownership rights begin.

Consistent with deeply-rooted legal principles, most owners have an intuitive sense of where the boundaries should lie. An eBay user who buys a video game[3] that was originally sold in Canada presumably knows that he should not "rip" the game by making pirated copies, but probably assumes that he can use his copy of the game in the

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[1] *See* World Intellectual Property Organization, "What Kind of Inventions Can Be Protected," *http://www.wipo.int/patents/en/faq_patents.html* (patented inventions range "from an everyday kitchen utensil to a nanotechnology chip"); Oliver Herzfeld, *Protecting Fashion Designs*, FORBES (Jan. 3, 2013), *http://www.forbes.com/sites/oliverherzfeld/2013/01/03/protecting-fashion-designs/#4950d7f473f8* .

[2] *See http://www.sec.gov/Archives/edgar/data/1509432/000119312511240287/ds1.htm#toc226103_11.*

[3] Video games are subject to numerous patents. *See* Ben Kuchera, *Patents on Video Game Mechanics Strangle Innovation, Fun*, ARS TECHNICA (Mar. 9, 2008), *http://arstechnica.com/gaming/2008/03/patents-on-video-game-mechanics-may-strangle-innovation.*

U.S. and later loan it to a friend. A traveler who buys a digital camera[4] in Germany has no reason to think that she secured manufacturing rights, but probably believes that she can bring her camera back home to the U.S. without it being seized as contraband.

However, prior to *Kirtsaeng*, uncertainty existed under copyright law about owners' rights to engage in such intuitively-reasonable transactions. Perhaps the most chilling example came when the Swiss watchmaker Omega etched a tiny, copyrighted design onto the casing of its Seamaster watches as a tactic to prevent unwanted importation and resale of the watches in the U.S.[5] When the Ninth Circuit Court of Appeals sided with Omega and this Court affirmed on a 4-4 split,[6] the possibility loomed that any product lawfully made and sold abroad could, at the copyright holder's whim, become illegal in the U.S.

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[4] Digital cameras are subject to numerous patents. *See* Steve Brachman, *Canon patent activity focuses on digital cameras and related technologies*, IPWATCHDOG (Jan. 30, 2015), *http://www.ipwatchdog.com/2015/01/30/canon-u-s-patent-activity-shows-focus-on-digital-cameras-and-related-technology/id=53814/*.

[5] See Doug Kari, *How an eBay Bookseller Defeated a Publishing Giant at the Supreme Court*, ARS TECHNICA (Nov. 25, 2014) 2, *http://arstechnica.com/tech-policy/2014/11/how-an-ebay-bookseller-defeated-a-publishing-giant-at-the-supreme-court*.

[6] *Omega v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008), *aff'd*, 131 S. Ct. 565 (2010) (*per curium*).

The Court in *Kirtsaeng*, by confirming a rule of exhaustion without geographical limitations, struck the proper balance between copyright and ownership. The opinion by Justice Stephen Breyer garnered praise and there has been no legislation introduced in Congress to undermine it.[7] Put simply, the rule works.

However, in light of the Federal Circuit Court of Appeals' divided *en banc* decision in this case, once again uncertainty exists about the boundary between intellectual property rights and ownership rights. As Yogi Berra might say, it's "déjà vu all over again" as the issues in *Kirtsaeng* get re-litigated in the patent arena.

As set forth below, by reaffirming its decision in *Jazz Photo Corp. v, International Trade Commission*,[8] the Federal Circuit sanctioned geographical limitations on patent exhaustion which are wholly inconsistent with the first sale doctrine as articulated in *Kirtsaeng*—even though patent exhaustion and the first sale doctrine arise from the same com-

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[7] *See, e.g.*, Editorial, *The Limits of Copyright Law*, LA TIMES (March 20, 2013), *http://articles.latimes.com/2013/mar/20/opinion/la-ed-copyright-kirtsaeng-supreme-court-20130320*; Gary Shapiro, *Supreme Court Gives American Consumers Victory Over Copyright Owners in Kirtsaeng vs. John Wiley & Sons*, FORBES (March 20, 2013), *http://www.forbes.com/sites/garyshapiro/2013/03/20/supreme-court-gives-american-consumers-victory-over-copyright-owners-in-kirtsaeng-vs-john-wiley-sons*.

[8] 264 F.3d 1094 (Fed. Cir. 2001).

mon law principles.[9] By reaffirming its decision in *Mallinckrodt, Inc. v. Medipart, Inc.*,[10] the Federal Circuit embraced the sort of "Not for sale in the United States" post-sale restrictions that *Kirtsaeng* and other decisions of this Court have consistently rejected.

*Amici curiae* respectfully submit that unless the petition is granted and the decision below overturned, title to millions of items of personal property will be clouded, a pall will be cast over resale and rental markets, and infringement litigation floodgates will open—the sort of "horribles" that the Court in *Kirtsaeng* sought to avoid.[11] For these reasons, *amici curiae* respectfully urge the Court to grant the petition.

## A. The Practical Concerns of *Kirtsaeng* Apply in the Patent Arena

A real-life example illustrates the stakes in this case. Five years ago Thailand was battered by typhoons—it was the worst monsoon season in half-a-century. Floodwaters inundated the industrial zone where most of the world's computer hard

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[9] *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984) (analogies between patent and copyright law are appropriate "because of the historic kinship between patent law and copyright law").

[10] 976 F.2d 700 (Fed. Cir. 1992).

[11] *See* 133 S. Ct. at 1366.

drives are manufactured.[12] ASCDI members, endeavoring to secure supply for their U.S. customers, began buying up hard drives from around the globe. Following are a few of the technology users in the U.S. who received shipments of hard drives that were acquired by ASCDI's membership during the worldwide hard drive shortage:

| **Defense** | **Medical** | **Education** |
|---|---|---|
| US Navy Strategic Systems | VA Medical Center | Vassar College |
| Northrop Grumman | Texas Children's Hospital | Yale Public Schools |
| General Dynamics | St. Jude Medical | Brookdale College |
| **Nonprofit** | **Finance** | **Corporate** |
| NY Museum of Modern Art | Wells Fargo Capital | Alcoa Inc. |
| The Nature Conservancy | Farmers Nat'l Bank | Ticketmaster |
| Underwriters Laboratories | Bayview Financial | Nikon Inc. |

*(continued)*

[12] Thomas Fuller, *Thailand Flooding Cripples Hard-Drive Suppliers*, NEW YORK TIMES (Nov. 6, 2011), *http://www.nytimes.com/2011/11/07/business/global/07iht-floods07.html.*

| Legal | Small Business | Phone/Media |
|---|---|---|
| Sullivan & Cromwell | Tasty Tacos | AT&T Global |
| Weil, Gotshal & Manges | Marshalltown Tools | Verizon |
| Latham & Watkins | Coeur d' Alene Resort | RR Donnelley & Sons |

The table above is just a sampling—ASCDI members imported thousands of hard drives to help relieve the shortage. However, hard drives are subject to numerous patents; the largest patent verdict in history involved hard drives.[13] Enforcement of the geographical limitations embraced by the Federal Circuit might have stopped these mission-critical products at the border—the type of practical concern that informed the Court's decision in *Kirtaseng*.[14] *Amici curiae* respectfully submit that that is reason enough for the Court to grant the petition.

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[13] *See* Joe Mullin, *Chipmaker Hopes to Overturn Largest Patent Verdict Ever: $1.5 Billion*, ARS TECHNICA (April 10, 2015), *http://arstechnica.com/tech-policy/2015/04/chipmaker-hopes-to-overturn-largest-patent-verdict-ever-1-5-billion.*

[14] *See* 133 S. Ct. at 1366.

### B. As Recognized in *Kirtsaeng*, Common Law and IP Law Abhor Restraints on Alienation

Common law has a long tradition of abhorring restraints on alienation. *Kirtsaeng* cited a 1628 decision of Lord Coke, which held that restraining alienation of chattels was "against Trade and Traffi[c], and bargaining and contracting betwee[n] man and man."[15]

Consistent with this time-honored principle, copyright law evolved the first sale doctrine to protect rights of alienation. In *Bobbs-Merrill Co. v. Straus*,[16] the publisher placed a legend inside the novel THE CASTAWAY, purporting to set a minimum retail price at which the book could be resold. The Court held this restriction to be unenforceable:

> [O]ne who has sold a copyrighted article. . . has parted with all right to control the sale of it. The purchaser. . . may sell it again. . . .[17]

Similarly, patent law developed the doctrine of patent exhaustion. When the patentees' successor in *Adams v. Burke*[18] tried to restrict the use of coffin lids beyond a ten-mile radius of Boston, the Court held that when a patentee "sells a machine

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[15] 133 S. Ct. at 1363.

[16] 210 U.S. 339 (1908).

[17] *Id.* at 350.

[18] 84 U.S. 17 Wall. 453 (1873).

or instrument whose sole value is in its use. . . he parts with the right to restrict that use."[19] In *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*,[20] when the patentee of a film projector tried to restrict the owner from using third-party film reels, the Court held that the film projector had been "carried outside the monopoly of the patent law and rendered free of every restriction that the vendor may attempt to put upon it."[21]

In copyright law, the first sale doctrine of *Bobbs-Merrill* became incorporated into the statutory framework.[22] In the patent arena, the doctrine of patent exhaustion remained a creature of common law—one that has repeatedly been reaffirmed. As recently as 2008, in *Quanta Computer, Inc. v. LG Electronics, Inc.*,[23] the Court reiterated the doctrine, unanimously holding that "the initial authorized sale of a patented item terminates all patent rights to that item."[24]

The court below veered far afield from *Quanta* and *Kirtsaeng*. By reaffirming *Jazz Photo*, the Federal Circuit abrogated the bright-line rule of exhaustion and made personal property rights dependent not simply on an authorized first sale,

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19 *Id.* at 456.

20 243 U.S. 502 (1917).

21 *Id.* at 516.

22 Currently codified at 17 U.S.C. § 109.

23 553 U.S. 617 (2008).

24 *Id.* at 625.

but also on the location where the first sale took place. By reaffirming *Mallinckrodt*, the court enabled an end-run around patent exhaustion—the sort of evasive tactic that this Court has repeatedly rejected.[25] *Amici curiae* respectfully submit that patent law needs to be brought back in line with the Court's prevailing authority.

### C. The Concerns in *Kirtsaeng* about Access to Worldwide Trade Are Applicable Here

Limiting ownership rights in property first sold abroad, so that patent holders can practice price discrimination and limit supply in the U.S., does not fit with the intent of the Copyright & Patent Clause.[26] As the Court observed in *Kirtsaeng*, "the Constitution's language nowhere suggests that its limited exclusive right should include a right to divide markets or a concomitant right to charge different purchasers different prices. . . ."[27] Instead the Court suggested that division of territorial

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[25] *See, e.g.*, *Kirtsaeng*, 133 S. Ct. at 1356 (restrictive legends on the book covers); *Bobbs-Merrill*, 210 U.S. at 350 (restrictive legend inside the book); *Adams v. Burke*, 84 U.S. 17 Wall. At 453 (ten-mile geographic limitation); *Motion Picture Patents Co.*, 243 U.S. at 502 (restriction barring third-party film reels).

[26] *See, e.g.*, *Motion Picture Patents*, 243 U.S. at 518 (the primary purpose of patent law isn't the "creation of private fortunes for patentees" but rather "to promote the progress of science and the useful arts" (quoting U.S. Const. Art I, § 8)).

[27] 133 S. Ct. at 1370-71.

markets is best handled through ordinary commercial practices such as contracts.[28]

This is a key concern, because although the patent term is shorter than the term for copyright protection, in the lifecycle of technology products it is practically forever. So what happens a few years out, when the patents remain in force, the products remain mission-critical to the user, but the manufacturer no longer carries spare parts?

Here is a real-world example: Because many defense systems continue to use older technology, defense contractors are sometimes "desperate to find the parts they need."[29] For more than three decades, ASCDI members such as Sotel Systems LLC in Maryland Heights, Missouri, have supplied technology equipment to the military, defense contractors and federal agencies. Sometimes the only way for them to supply these older parts is to acquire products that were first sold overseas.

These ASCDI members, when acquiring products in the world market to support their American customers, should not be faced with a Gordian knot of determining where the first sale took place, which U.S. patents may apply, and whether those patents remain in force. The approach in *Kirtsaeng*, which

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[28] *See id.* at 1371.

[29] Benj Edwards, *If It Ain't Broke, Don't Fix It: Ancient Computers in Use Today*, PCWORLD 2 (Feb. 19, 2012), *http://www.pcworld.com/article/249951/if_it_aint_broke_dont_fix_it_ancient_computers_in_use_today.html*.

vests rights of alienation in the owner, provides the market with simplicity and clarity.

### D. The Federal Circuit's Approach Is Unworkable

As noted in *Kirtsaeng*, more than $2.3 trillion worth of foreign goods were imported into the U.S. in 2011, "many of these goods after a first sale abroad."[30] International online shopping has become a burgeoning market.[31] U.S. travelers spend billions of dollars shopping overseas.[32] These travelers and online shoppers reasonably expect that they can buy goods from around the world and enjoy full ownership rights, yet if the transactions were scrutinized by the Federal Circuit it is likely that many would be held infringing. Is the citizenry out of step with the law, or vice-versa?

Even if parties wanted to ensure that every patent-protected component was first sold in the

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[30] 133 S. Ct. at 1365.

[31] *See* Catherine Clifford, *International Online Shopping Expected to Almost Triple in Next 5 Years*, ENTREPRENEUR (July 22, 2013), *http://www.entrepreneur.com/article/227519*.

[32] Michael Armah and Teresita Teensma, *Estimates of Categories of Personal Consumption Expenditures Adjusted for Net Foreign Travel Spending*, BUREAU OF ECONOMIC ANALYSIS, U.S. DEPARTMENT OF COMMERCE 15 (April 2012) (estimated overseas spending by U.S. residents exceeded $119 billion in 2008, up from $78 billion in 2002), *http://bea.gov/scb/pdf/2012/04%20April/0412_pce.pdf*.

U.S. or had the patent holder's consent for use in the U.S., it would be next-to-impossible to conduct such an analysis.[33] Again, consider the smartphone: ubiquitous, actively traded, and implicated by approximately 250,000 patents.[34] How can a buyer ensure that none of the components in a smartphone was acquired abroad without the patent holder's consent?

In the proceedings below, patent interests dismissed such concerns as hypothetical, arguing in effect that the *Jazz Photo* geographical limitation fails in theory but functions in practice. But as the Court observed in *Kirtsaeng*, a "law that can work in practice only if unenforced is not a sound [] law. It is a law that would create uncertainty, would bring about selective enforcement, and, if widely enforced, would breed disrespect. . . ."[35]

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[33] *See* Christina Mulligan and Timothy B. Lee, *Scaling the Patent System*, 68 NYU ANNUAL SURVEY OF AM. LAW 289. 291-92 (March 16, 2012) (noting that the costs of researching, identifying. and analyzing the software patents relevant to a given product "are so high that most firms don't even try to avoid infringement by investigating them").

[34] *See http://www.sec.gov/Archives/edgar/data/1509432/000119312511240287/ds1.htm#toc226103_11.*

[35] *Kirtsaeng*, 133 S. Ct. at 1366.

## CONCLUSION

The Federal Circuit's decision clouds title to millions of personal property items and casts a pall over countless transactions. It is unwise, unworkable and unwarranted under *Kirtsaeng*, *Quanta* and other prevailing authority. *Amici curiae* respectfully urge the Court to grant the petition.

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